UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN E. WOODS,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Docket No. 03-62-B-W**
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this appeal from a decision of the commissioner denying an application for Supplemental Security Income ("SSI") benefits appears *pro se* after having been advised of his right to be represented by an attorney. Record at 17, 18, 26, 35-36. His only statement of error submitted pursuant to this court's Local Rule 16.3(a)(2)(A) is that he was unable to convey to the commissioner "my total loss of edge. That is the loss of being able to remain vertical for more than 30 minutes at a time." Plaintiffs [sic] itemized statement of specific errors (Docket No. 7) (emphasis in original). At oral argument, the plaintiff amended this statement to an assertion that he cannot stand or bend for more than 45 minutes at a time. He

[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held by telephone on January 28, 2004, pursuant to Local Rule 16.2(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

also stated during oral argument that his "loss of edge" was a lack of interest in working; he no longer has any competitiveness nor any urge to do a job well. On the showing made, I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had degenerative disc disease of the spine, an impairment that was severe but which did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 2-3, Record at 23; that his assertions concerning his impairment and its impact on his ability to work were not fully credible, Finding 4, *id*.; that he had the residual functional capacity to life and carry up to 20 pounds, sit for 60 minutes at a time for up to six hours in an eight-hour work day, stand for 60 minutes at a time for up to six hours in an eight-hour work day and walk for 60 minutes at a time for up to six hours in an eight-hour work day, Finding 5, *id*. at 23-24; that his capacity for the full range of light work was diminished by non-exertional impairments that made him unable to perform work requiring climbing of ladders, ropes or scaffolds, repetitive stooping, or exposure to uneven surfaces, Finding 6, *id.* at 24; that he had occasional mild to moderate pain which allowed enough attentiveness and responsiveness to carry out normal work assignments satisfactorily, *id*.; that he was unable to perform his past relevant work, Finding 7, *id*,; that given his age (51), high school education, lack of transferable skills, work experience and residual functional capacity, a finding of "not disabled" was reached within the framework of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid"), Findings 8-11, *id*. at 24 & 19; and that he was therefore not disabled as that term is defined in the Social Security Act at any time through the date of the decision, Finding 12, *id*. at 24. The Appeals Council declined to review the decision, both before and after the plaintiff submitted additional medical evidence, *id*. at 6-11, making it the final determination of the

commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence, 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1972); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Sept 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff appears to challenge only the administrative law judge's finding that he was capable of standing for up to 60 minutes at a time for a total of six hours in an eight-hour work day. The plaintiff testified that he could not stand "for prolonged periods," that he walked "a couple of miles usually a day," and that he could stand for "20 minutes . . . to the outside." Record at 47, 49, 58. The administrative law judge found that "the medical evidence of record does not document such a serious degree of limitation," and noted that the plaintiff had received only conservative treatment, was followed on a yearly basis for his back and neck pain, and took only Ibuprofen and aspirin for the pain. *Id*. at 21. He also noted that the

plaintiff, by his own testimony, was "capable of performing a full range of activities of daily living." *Id*. at 22. When asked during oral argument to identify any medical evidence in the record that supported his contention that he could not stand for more than 45 minutes at a time, the plaintiff referred generally to the records of Dr. Long and reviewed pages 493-95 of the record, but nothing in those records supports this assertion. Dr. Long recommended only that the plaintiff not return to manual labor. Record at 494, 495. The administrative law judge complied with Social Security Ruling 96-7p in evaluating the plaintiff's testimony in this regard; he considered the testimony in the light of the medical evidence and the plaintiff's testimony concerning his daily activities, medication, and other factors. Record at 21-22; Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2003), at 135. None of the medical evidence submitted by the plaintiff after the hearing supports this claim. Record at 8-9, 14.

In addition, one of the jobs identified by the administrative law judge as being available for the plaintiff does not appear to require standing in excess of 45 minutes at a time. The administrative law judge listed the jobs of sedentary cashier, light cashier, general office clerk, and traffic shipping and receiving clerk. *Id*. at 23. A cashier's job at the sedentary level "involves sitting most of the time, but may involve walking or standing for brief periods of time." *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991) § 211.362-010. *See also* Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 29. For this reason as well, the plaintiff is not entitled to remand.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of January, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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